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FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, ET AL.,
Petitioners,

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF JACKSON, ET AL.,
Respondents.

BRIEF OF RESPONDENTS

John R. Stokes
City Attorney
City Hall
Jackson, Mississippi

Thomas H. Watkins
Suite 900—Bankers Trust Plaza Bldg.
Jackson, Mississippi

Elizabeth W. Grayson
Suite 900—Bankers Trust Plaza Bldg.
Jackson, Mississippi
Attorneys for Respondents

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QUESTION PRESENTED

After 1963 when the integration of all recreational facilities furnished by the City of Jackson was required by the Federal Courts[1], the City immediately integrated all

1. *Clark* v. *Thompson*, 206 F.Supp. 539 (1962); aff'd 313 F.2d 637 (1963); cert. den. 375 U.S. 951, 11 L.ed.2d 312 (1963).

its recreational facilities. However, in the exercise of its discretion based on its best judgment it decided to no longer make available to any citizen any public swimming pools. Since that time no swimming pools have been available to either white or black citizens, all races being treated equally.

The only question here presented is: Can this Court by mandatory injunction require the City of Jackson to make available to its citizens a recreational facility such as a swimming pool, in spite of the best judgment of the City that the same could not now be safely or economically operated, i.e., do Petitioners have any *constitutional right* to demand such facilities? Respondents deny that Petitioners have any such right under either the Thirteenth or the Fourteenth Amendments to the Constitution.

STATEMENT OF THE CASE

In 1963 the City of Jackson was operating equal but separate recreational facilities such as parks and golf links, including swimming pools. A suit was brought in the Southern District of Mississippi to enjoin the segregated operation of these facilities. The City of Jackson took the position in that litigation that the segregation of recreational facilities, if separate and equal recreational facilities were provided and if citizens voluntarily used segregated facilities, was constitutional. The District Court in *Clark* v. *Thompson*, supra, held otherwise. While refusing to grant injunctive relief it entered a declaratory judgment requiring the allowance of use of these recreational facilities by all races. Petitioners appealed to the Fifth Circuit Court of Appeals. The judgment of the District Court was affirmed on March 6, 1963, reported 313 F.2d 637. A petition for Rehearing was denied on April 23, 1963. Certiorari

was not denied until *December 16, 1963* (375 U.S. 951, 11 L.ed.2d 312).

Thereafter the City immediately integrated all recreational facilities, i.e., its parks, golf links, zoo, auditorium, etc. No such facilities were closed. The binding effect of the decision in *Clark* has never been questioned by the City.

However, at that time the City Council made an administrative decision, by legislative enactment of its City Council, that it would close all swimming pools and not furnish this particular type of recreational facility to any citizen. While its decision followed, and in that limited sense resulted from, the *Clark* decision it was not motivated by a desire to discriminate on account of race[2]. The intent and purpose of the City in so doing was specifically found by the court below in this litigation, i.e.: "The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner." (A. 28). *Such reasons would not justify discrimination.* They would not have been a defense in *Clark*, supra. However, they justify an administrative decision of policy of the City applicable equally to all citizens and where there was no denial of fundamental privileges of citizens.

After the swimming pools had been closed to all citizens for two years the present litigation was brought seeking mandatory injunctive relief to require the City to reopen and maintain swimming pools for its citizens on the alleged ground that the plaintiffs were being denied their rights under the Fourteenth Amendment[3].

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2. There is a vast difference between a decision based on "racial considerations" and a *purposeful racial discrimination.*

3. Any rights under the Thirteenth Amendment were an afterthought.

Factually, Petitioners' case is predicated on one statement in an opinion in 1963 from the Fifth Circuit to the effect that the State of Mississippi and the City of Jackson had in the past had an undeviating official policy of segregation[4]. Petitioners allege that "This is the single most important fact in the present case, and provides a backdrop for the offense which led to the institution of this litigation" (P. Brief p. 4).

Based on this statement from this opinion Petitioners here seek to deny Respondents due process of law. Petitioners state that the burden of proof is upon Respondents to disprove that the closing of the pools had a discriminatory purpose. No case is cited to that effect[5].

The official policy of segregation of Mississippi since *Brown* has been no more than the exercise of its constitutional rights to litigate to protect what it believed were its constitutional rights. As pointed out by Petitioners the Mississippi statute now in force is § 4065.3 which merely requires members of the executive branch of the government ". . . to prohibit, by any lawful, peaceful and *constitutional means* the implementation of or the compliance with the Integration Decision of the United States Supreme Court . . . and to prohibit by any lawful, peaceful and *constitutional means*, the causing of mixing or integration of the white and negro races . . . in public schools . . . public places of amusement . . .".

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4. Quoted from *U. S.* v. *City of Jackson*, C.A. 5, 318 F.2d 15, *decided in 1963*. The case involved removal from restrooms in terminals of signs indicating segregation thereof. After the decision the signs were removed and all of the statutes referring thereto have been repealed. All public facilities of the City of Jackson are now integrated. Conditions in Mississippi have changed since 1963.

5. *Watson* v. *Memphis*, 373 U.S. 526, 10 L.ed.2d 529 (1963) does not so hold. The issue was proof by the City to delay segregation, admittedly required.

The controlling rule as to the burden of proof is stated in *Snowden* v. *Hughes*, 321 U.S. 1, 88 L.ed. 497 (1943). There a candidate for a state office brought an action against the members of the State Primary Canvassing Board to recover damages for alleged infringement of his civil rights in violation of the Fourteenth Amendment. The complaint alleged that the Board failed to issue a certificate of nomination to him after he received a sufficient number of votes at a primary election to entitle him thereto and that the defendants "wilfully, maliciously and arbitrarily" failed and refused to file with the Secretary of State a correct certificate reflecting that he was a nominee and that defendants conspired and confederated together for that purpose and that their action constituted "an unequal, unjust and oppressive" administration of the state election laws thereby depriving plaintiff of his rights under the Fourteenth Amendment.

This Court in affirming a dismissal of the complaint for failure to state a cause of action stated:

> ". . . There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes."
>
> "The unlawful administration by state officers of a state statute fair on its face, *resulting* in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is *shown* to be present in it *an element of intentional or purposeful discrimination.* . . . a discriminatory purpose is not presumed, Tarrance v. Florida, 188 US 519, 520, 47 L ed 572, 573, 23 S Ct 402, there must be a showing of 'clear and intentional discrimination' . . .
>
> "The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets 'wilful' and 'malicious' applied to

> the Board's failure to certify petitioner as a successful candidate. . . . These epithets disclose nothing as to purpose or consequence of the failure to certify . . ."[6]

Not only have Petitioners failed to offer any proof that the act of the City in closing the swimming pools was one of "intentional or purposeful discrimination" but the undisputed proof of the City is to the contrary.

There was involved here *an administrative decision of a municipality* as to a *discretionary function*. The undisputed proof is that this administrative decision of the City was based on consideration of the maintenance of law and order and to avoid economic loss.

The only proof by Petitioners was one affidavit by one Carolyn Stephens (A. 2). The only facts alleged in this affidavit dealt with the closing of the pools and the policy and attitude of the City prior to the conclusion of *Clark* v. *Thompson*, supra, on December 16, 1963. Factual allegations referred to the equal but separate segregated recreational facilities prior to that time, a list of which was made Exhibit "A" to the affidavit[7]. There is not one iota of proof by Petitioners that the decision after December 1963 of the City to permanently close the pools was one of "intentional or purposeful discrimination".

On the other hand, the proof of the City to the contrary is undisputed. The affidavit of Mayor Thompson was as follows:

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6. *Snowden* has been recently cited with approval in *Shock* v. *Tester*, C.A. 8, 405 F.2d 852 (1969), cert. den. 394 U.S. 1020, 23 L.ed.2d 45 (1969), also pointing out "Not every grievance that an individual has against the government, even though meritorious, reaches constitutional proportions . . ."; *Wessling* v. *Bennett*, C.A. 8, 410 F.2d 206 (1969); *Delia* v. *Court of Common Pleas of Cuyahoga County*, C.A. 6, 418 F.2d 205 (1969); *Colon* v. *Grieco*, D.C. D. N. J., 226 F.Supp. 414 (1964).

7. The only other offer of proof was by purported quotations of the Mayor from local newspapers. These were out of context and not corroborated, i.e., were pure hearsay and were alleged statements prior to the final decision in *Clark*.

"Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

"All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race . . . and all facilities of said parks and auditoriums have been and are available to all citizens of the City regardless of race." (A. 21)

The affidavit of Mr. George T. Kurts, Recreational Director of the City, was to the following effect:

"That after the decision of the Court in the case of Clark v. Thompson, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis, and the City decided that the *best interest of all citizens* required the closing of all public swimming pools owned and operated by the City; that the City thereby decided not to offer that type of recreational facility to any of its citizens; that it has not done so and does not intend to reopen any of said pools.

"That all other recreational facilities which the City makes available to its citizens have been completely desegregated and have been made available to all citizens of the City regardless of race; that this includes but is not limited to the golf courses, the playground areas, swings, see-saws, rings, and other playground facilities . . ." (A. 18)

In another affidavit by Mr. Kurts (A. 16) he states: ". . . The City of Jackson would suffer a serious financial loss if it attempted to operate said pools, or any of them, on an integrated basis"[8].

In this litigation the District Court made a specific finding of fact that the acts of the City were not ones of "intentional or purposeful discrimination". The finding of the District Court was affirmed by the Fifth Circuit (A. 34). The Court of Appeals quoted from the District Court's Finding of Fact to the effect that the closing was based on economic reasons and maintenance of law and order and stated: "There seems to be no dispute as to the facts; certainly the findings of fact are not clearly erroneous." (A. 35)

On Petition for Rehearing the Court of Appeals adopted the findings of fact of the District Court and stated:

> ". . . In dismissing this complaint, after considering the affidavits and testimony, the district court found that the city officials acted in the interest of preventing violence and preserving economic soundness to the City's operations. Even though such motive obviously stemmed from racial considerations, we know of no prohibition to bar the city from taking such factors into account and being guided by conclusions resulting from their consideration."[9] (A. 53)

It is true that a dissenting opinion was filed (A. 56). There was also filed a specially concurring opinion by seven judges (A. 55), where it was pointed out that the dissenting

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8. These affidavits were not self-serving assertions. They were not "speculations". They factually stated the considered opinion and best judgment of the Commissioners which motivated these decisions as to the cessation of operation of a discretionary function.

9. The court recognizing the validity of the consideration of racial factors if not for an invidious or discriminatory purpose, citing from *Shuttlesworth* v. *Birmingham Board of Education*, 162 F.Supp. 372 (1958), aff'd 358 U.S. 101, 3 L.ed.2d 145 (1958).

opinion was necessarily based upon facts not proved and not found by the court below, i.e., that there was no proof whatsoever of any racially discriminatory purpose in the discretionary decision to close the pools. This opinion contains the following language:

> "The final footnote[1] of the dissenting opinion shows that the differences between the majority and the dissenters are largely factual. . . . With deference, it would appear that *the dissenting opinion*, in making the finding that the City of Jackson acted in bad faith, *simply departs from the record. There is no record basis for such a finding.*
>
> "Whether to operate swimming pools, racial discrimination aside, is a matter for the City of Jackson. We can easily surmise, indeed it may not be disputed, that the closing here was racially motivated. Mere racial motivation, however, *is not proof of a racially discriminatory purpose in the closing.* . . . We cannot assume racial discrimination simply from the fact of the closings. Constitutional principles, as important as they are, must nevertheless rest on facts." (A. 44-45)

In spite of *Snowden*, and in spite of the fact that there is not one iota of proof in this record that the City of Jackson, although taking race into consideration in making its decision, made the same with the intention of discriminating or for that purpose, Petitioners still allege as a fact that the motives of the City of Jackson arose solely from the belief that Negroes were inferior and could not be associated with. No such assumption can be made. Inferiority had nothing to do with the decision of the officials.

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1. "We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution." (A. 73)

The best judgment of the City in 1963 is now fully corroborated. This Court will take judicial knowledge of the fact that there still exists a serious danger of violent clashes between young people of different racial groups, whether stemming from acts of or promoted by one group or the other. It is apparent that such clashes are more probable where there is close contact in a swimming pool and more dangerous because of the depth of the water. There was and is unquestionably probability of friction or disorder.[10] There was also the probability that parents of either or both groups would restrict their children's attendance in such swimming pools because of the danger of such friction or disorder, with the result that the income from the pool would be severely limited and result in severe economic loss.

Certainly the discretional closing of the pools was the result of the *considered best judgment* of the officials, whether right or wrong, that the City could not adequately protect its citizens of either race in integrated pools and such operation would result in severe economic losses.

The City of Jackson is not by its present action perpetuating past inequalities or perpetuating past racial discrimination. All citizens are equally denied city pools. *If there is any inequality now it is economic rather than racial.* As said by the court below:

> ". . . The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially

10. Nor could the financial liability of the City for failure to preserve peace in the performance of this proprietary function be ignored.

less fortunate citizens [of both races] of recreational facilities available on a completely private basis to the more affluent." (A. 53)

However, there is no proof here of even any economic inequality. There are integrated pools now available in Jackson. There are Negro citizens of Jackson who are financially able to build private swimming pools. The City of Jackson, with over 150,000 citizens, is not a rich city. In California one may find a large number of private swimming pools maintained by many private citizens. In this city as many white children as Negro children are foreclosed the enjoyment of this particular recreational facility.

SUMMARY OF THE ARGUMENT

I

Petitioners have no rights under the Thirteenth Amendment to have a city make available to them public swimming pools. This Amendment only protects the basic "Fundamental Rights" of a citizen of a State, i.e., the class of rights which the State Governments were created to establish and secure. Such rights include the right to work for whom they please, to make and enforce contracts, to sue and be sued, and to give evidence. The right to have a swimming pool made available is not such a privilege or immunity of citizenship.

II

Petitioners here have no rights under the Fourteenth Amendment of the Constitution forbidding a State to deny to any person "the equal protection of the law." All citizens of the City are equally deprived of public swimming pools. Discrimination as protected by the Fourteenth Amendment requires that there be a difference between the applicability of State law or actions to some citizens

as compared with other citizens. So long as the acts of the City apply to all alike the requirement of equal protection of the law is met.

III

Respondents have not "punished" Petitioners for litigating in *Clark* their right to integrated city recreational facilities. There is no intimation of any threats, intimidations or criminal prosecution and access to the courts has not been denied Petitioners. Petitioners have proved no retaliatory intent or motive on the part of the City in closing the swimming pools. No constitutional federal statute has been violated. Moreover there having been no deprivation of any *constitutional right* by the City, motive is immaterial.

ARGUMENT[11]

POINT I

Petitioners Have Been Denied No Rights under the Thirteenth Amendment and Denied No Privileges and Immunities of Citizens of the United States under the Fourteenth Amendment. The Only Rights Protected Thereby Are the "Fundamental Rights" of Citizenship, Which Do Not Include the Right to Have a City Furnish a Public Swimming Pool.

The basic question here is: Is a municipality under any obligation to its citizens to make available public

11. A reply to Petitioners' argument is difficult: (1) Petitioners again and again pick up a single clause or sentence from an opinion, completely out of context and disconnected from the facts or the holding of the case, usually from a dissenting opinion, and attempt to build an entirely new principle of constitutional law therefrom or thereon. Specific situations control decisions, not general or loose language in the opinion. *Hughes* v. *Superior Court of California*, 339 U.S. 460, 94 L.ed 339 (1950); (2) Petitioners again and again state an alleged principle of law and follow it with a bare citation by name of various cases. The cases do not support the principle announced. Distinguishing all of them would be impractical; (3) There is a continuing appeal for a decision based on sympathy, passion or prejudice.

swimming pools, where none are furnished for any citizens, and is such an obligation enforceable under the Constitution of the United States?

The rights granted by the Thirteenth Amendment are more limited than those granted by the Fourteenth Amendment. The Thirteenth Amendment only protects against inequality of treatment or discrimination. Moreover, the rights under the Thirteenth Amendment are strictly limited to the "fundamental rights" of citizenship, such as the right to own and use property, the right to make and enforce contracts, or the right to sue and give evidence, i.e., the privileges and immunities of citizenship. These "fundamental rights" of citizenship do not include the right to have a municipality make available to its citizens a specific recreational facility.

The Thirteenth Amendment literally merely abolished the "institution" of slavery. Congress, by virtue of § 2 thereof giving it authority to enforce the article by appropriate legislation, has enlarged the rights thereunder to include a guaranty of the "fundamental rights" of citizenship. It has gone no further.

Amicus Curiae argue from the debates in Congress in 1864 and 1865, prior to the submission of the Amendment to the States for adoption, that the Amendment granted unlimited rights of any kind and character.[12] The flowery language of these early debates was typical of the political oratory of the day and arose from the emotions of the late war and the proclamation of Lincoln. They are not illuminating.

In "The 'New' Thirteenth Amendment: A Preliminary Analysis", 82 *Harvard Law Review*, 1294 (1969) there appears the following language:

12. It will be noted that Petitioners in their brief do not adopt this argument.

> "The framers' debates were directed more to the desirability of emancipation than to the meaning of the language. They were conducted on a level of hyperbole befitting the fervor which had attached itself to the issue after thirty years of agitation. . . . The oratory, however, is ambiguous. . . . The rights which most of the framers anticipated that the freemen would enjoy were probably only of the theoretical sort already granted in the North. When congressmen described the 'incidents of slavery' they tended to refer, for example, to the breach of 'the conjugal relationship,' the destruction of the slaves' capacity to 'acquire and hold [property],' and the denial of the 'right to testify' in court."[13]

The Thirteenth Amendment was adopted by the states in December 1865. The next year there was introduced in Congress the Civil Rights Act of 1866. Therein it was provided that all citizens of the United States "of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime where the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States *to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens* . . ." (Ch. 31, Sess. 1, 39th Congress).

The proposed Act created an enormous amount of opposition on the ground that it was not justified under the Thirteenth Amendment. The debate thereon was lengthy and evidenced a wide difference of opinion among the members of Congress as to whether or not the Thirteenth Amendment permitted the enactment of the law protect-

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13. On the irrelevancy and inconclusiveness of such source see *Brown* v. *Board of Education*, 347 U.S. 483, 98 L.ed. 873 at p. 878 (1954).

ing these limited "fundamental rights". President Andrew Johnson vetoed the Bill, feeling that it was unconstitutional. In 1866 Congress was debating overriding the veto of the President. Even the proponents thereof recognized and admitted that the rights protected by the Thirteenth Amendment were limited to the basic and fundamental rights of a citizen of any government.[14]

Even after the passage of the 1866 Civil Rights Act many of those who voted for the Act expressed serious doubt as to its constitutionality. This led to the adoption of the Fourteenth Amendment only a few months later, which included the provision:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.[15] No State shall make or enforce any law

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14. See, for example, the language of Mr. Lawrence of Ohio in speaking in favor of overriding the veto: "It [The Civil Rights Act] does not affect any political right, as that of suffrage, the right to sit on juries, hold office, &c. This it leaves to the States, to be determined by each for itself. It does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States." "But it does provide that as to *certain enumerated civil rights* every citizen 'shall have the same right in every State and Territory.' That is whatever of certain civil rights may be enjoyed by any shall be shared by all citizens in each State, and in the Territories, and *these are*: 1. To make and enforce contracts. 2. To sue, to be sued, and to be parties. 3. To give evidence. 4. To inherit, purchase, lease, sell, hold, and convey real and personal property. 5. To be entitled to full and equal benefit of all laws and proceedings for the security of person and property." *Congressional Globe*, April 7, 1866, p. 1832.

15. It was this provision of the Fourteenth Amendment, and not any provision of the Thirteenth Amendment, which overruled the *Dred Scott* decision (60 U.S. 393, 15 L.ed. 691, 1857) which merely held that a Negro was not a citizen under the Constitution and therefore not entitled to the rights of a citizen. We submit that Petitioners are appealing only to prejudice in stating that the affirmance of this case would "revive" Dred Scott or that unless this case is reversed Dred Scott would once again become the law of the land. Respondents, of course, know that Negroes are citizens and entitled to all of the rights of citizens. The question here is merely whether a citizen has a right to demand of a municipality that it make available a public swimming pool.

which shall abridge the privileges or immunities of citizens of the United States . . ."

The adoption of the Fourteenth Amendment, followed by the re-enactment of the 1866 Civil Rights Act as the Civil Rights Act of 1870, were in a large part designed to put the doubts at rest as to the constitutionality of the Civil Rights Act of 1866 under the Thirteenth Amendment. H. Flack, *The Adoption of the Fourteenth Amendment*, pp. 94-95.

The limited rights granted by the Thirteenth Amendment, i.e., limited to "fundamental rights of citizenship", was made clear. *The Civil Rights Cases*, 109 U.S. 3, 27 L.ed. 835 (1883). In that case there was involved an 1875 Act of Congress prohibiting any discrimination in any accommodations of inns, public conveyances, theaters and other places of public amusement on account of race or color. The Act was held unconstitutional and not saved by the Thirteenth Amendment.[16] The Court assumed that the Thirteenth Amendment went beyond merely destroying the institution of slavery but included the right to vindicate "*those fundamental rights which appertain to the essence of citizenship*, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." However, the Court held that the right to equal use of such accommodations was not such a fundamental right which was of the essence of citizenship or a right protected by the Thirteenth Amendment. This Court in holding the Statute unconstitutional used the following language:

"Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper

16. It was not unconstitutional under the Fourteenth Amendment which only prohibited State actions. The Fourteenth Amendment was thus not involved. Later acts of Congress along such lines are justified only under the *Commerce Clause* of the Constitution.

laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the 13th Amendment. . . . But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? . . . The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the 13th Amendment, before the 14th was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, *those fundamental rights which are the essence of civil freedom, namely: the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoined by white citizens.* Whether this legislation was fully authorized by the 13th Amendment alone, without the support which it afterwards received from the 14th Amend-

ment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time, in 1866, *Congress did not assume, under the authority given by the 13th Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship*, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery. . . ."

This case has never been overruled.

In *Slaughter-House Cases*, 16 Wall. 36, 21 L.ed. 394 decided in 1872 it was held that the provision of the Fourteenth Amendment that no State should make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States* was limited.[17] The Court held that the privilege of conducting a business was a privilege of a citizen of a State, not of the United States, and not protected by the Constitution, either under the Thirteenth or Fourteenth Amendment. In that case there was under attack a statute of Louisiana chartering the Slaughter-House Company and granting to it the exclusive privilege to establish and maintain stockyards and slaughterhouses in the City of New Orleans. Certain butchers in New Orleans who desired to slaughter their own cattle at their own place of business attacked the statute as unconstitutional on the ground that it created an involuntary servitude forbidden by the Thirteenth Amendment

17. Such as the privilege of presenting any claim one might have against the Government; the privilege of demanding the care and protection of the Federal Government when on the high seas or within the jurisdiction of a foreign government; the privilege of peaceable assembly and petition for redress of grievances; the privilege of writ of habeas corpus; the privilege of using navigable waters of the United States; and the privilege of becoming a citizen of any State in the Union by bona fide residence therein.

and abridged the privileges and immunities of citizens of the United States forbidden by the Fourteenth Amendment. The Court after holding that it did not abridge the privileges and immunities of citizens of the United States then held that it did not abridge the privileges of citizens of the State in that no person had an absolute right to conduct any business he wanted but was subject to such restraints as the State might prescribe for the general good of the whole. The Court in discussing what were the privileges and immunities of a citizen of a State used the following language:

> " 'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? *We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate.' *'They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.' . . . And they have always been held to be the class of rights which the state governments were created to establish and secure.*"

It cannot be said that the right to have a city provide a public swimming pool is a fundamental privilege which belongs to the citizens of all free governments and a right *which the state government was created to establish and secure.*

Equally limited is *Jones* v. *Alfred Mayer Co.*, 392 U.S. 409, 20 L.ed.2d 1189 (1968) so heavily relied on by Petitioners. There the plaintiff sought injunctive relief against a private company for refusing to sell him a home in a subdivision solely because he was a Negro. Relief was sought under a Federal Statute, 42 *U.S.C.* § 1982, part of the original 1866 Civil Rights Act, providing that all citizens had the same right as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.[18] The constitutionality of the statute was attacked.

The only issue in the case was whether or not, unlike the Fourteenth Amendment, the Thirteenth Amendment protected rights as against private persons and whether § 1982 was broad enough to include deprivation of "fundamental rights" by private persons. The Court interpreted the statute as prohibiting deprivation of a fundamental right (i.e., the ownership of property) by individuals. This was the only actual holding of the Court.

The Court discussed the constitutionality of the statute under the Thirteenth Amendment, basing such constitutionality only on *the fact that the right to buy and sell property was one of the fundamental rights of a citizen.* The Court not only held that it was within the civil rights protected by the Thirteenth Amendment but that there was actual discrimination on account of race and then particularly pointed out that Congress had enacted a statute dealing therewith under the authority of the sec-

18. Petitioners sue here under 42 *U.S.C.* 1981, also from the 1866 Civil Rights Act, limiting rights to the making of and enforcing of contracts, to sue, be parties, give evidence, and to full benefit of all laws, the security of persons and property. The right to availability of a public swimming pool does not come within any of these rights. Petitioners also claim under § 1983 which itself grants no rights or privileges but merely a remedy. *Monroe* v. *Pape*, 365 U.S. 167, 5 L.ed.2d 492 (1961).

ond section of the Thirteenth Amendment, specifically providing: "Congress shall have power to enforce this article by appropriate legislation." The Court pointed out from the Congressional Record that it was the intent of Congress in passing the Thirteenth Amendment, and particularly section 2 thereof, to authorize legislation which would preserve to every citizen the "great fundamental rights" of a citizen. The opinion quotes remarks of Senator Trumbull in early December 1865[19]:

> ". . . 'And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, *to buy and sell when they please*, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to these men every one of these rights: they would not be freemen without them. *It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights* . . .' (emphasis by the court)

"Five days later, on December 18, 1865, the Secretary of State officially certified the ratification of the Thirteenth Amendment. . . . On January 5, 1866, Senator Trumbull introduced the bill he had in mind —the bill which later became the Civil Rights Act of 1866. He described its objectives in terms that belie any attempt to read it narrowly: . . . Senator Trumbull's bill . . . would affirmatively secure for all men, whatever their race or color, what the Senator called the 'great fundamental rights': the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.' As to those basic civil rights, the Senator said, the bill would

19. Cong. Globe, 39th Cong. 1st Sess. 43.

'break down all discrimination between black men and white men.'

"It thus appears that, when the House passed the Civil Rights Act on March 13, 1866, it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding all *racial discrimination affecting the basic civil rights enumerated in the Act.* . . . In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: *to prohibit all racial discrimination*, whether or not under color of law, *with respect to the rights enumerated therein*—including the right to purchase or lease property."

Thus the right protected in *Jones* was one of the "fundamental rights" of any citizen (Not a mere desire to have a public swimming pool available).

The emphasis placed by the Court upon the fact that Congress had acted and passed the statute under § 2 of the Amendment is shown by the following quotation from the opinion:

"By its own unaided force and effect, the Thirteenth Amendment 'abolished slavery, and established universal freedom.' Civil Rights Cases, 109 US 3, 20, 27 L ed 835, 842, 3 S Ct 18. Whether or not the Amendment itself did any more than that—a question not involved in this case[20]—it is at least clear that the enabling clause of that Amendment empowered Congress to do much more. . . . Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth Amendment to the floor of the

20. Here, under Petitioners' argument the Amendment itself would have to grant the right sought in that there has been no legislative action. The right sought is beyond the "fundamental rights". Congress must grant it if it can constitutionally. 82 *Harvard Law Review* at p. 1319.

Senate in 1864. In defending the constitutionality of the 1866 Act, he argued . . . 'Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.' . . . this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery —its 'burdens and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.' Civil Rights Cases, 109 US 3, 22, 27 L Ed 835, 843, 3 S Ct 18."

"Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to 'go and come at pleasure' and to 'buy and sell when they please'—would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man At the very least, the freedom *that Congress is empowered to secure* under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."

There was thus involved in *Jones* both discrimination solely on account of race and a federal statute granting property rights and a right which was one of the "fundamental rights" of a citizen.

Petitioners argue that this Court should now "finish the historic work that was begun in Jones".[21] As stated, the only historic portion of *Jones* was the application of

21. Petitioners apparently urge that the Courts go further and hold that under the Thirteenth Amendment individuals could not deny others any social or economic equality. The implications are staggering. Courts should not be put under pressure to "assume the duties of parenthood". 82 *Harvard Law Review* 1294.

§ 1982 and the Thirteenth Amendment to acts of private citizens. It merely protected rights by individuals against deprivation of "fundamental rights".

POINT II

Petitioners Have Not Been Denied the Equal Protection of the Law under the Fourteenth Amendment.

The provision of the Fourteenth Amendment relied on merely states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The administrative decision of the City Council to close all swimming pools applied equally to all citizens and has been and is being enforced equally as to all citizens. Discrimination as protected by the Fourteenth Amendment requires that there be a "difference", or a "distinction" between the applicability of State laws or actions to some citizens as against its applicability to others. "So long as the law applies to all alike, the requirements of equal protection are met". *Louisiana* v. *Resweber*, 329 U.S. 459, 91 L.ed. 422 (1947).

Before there is a denial of equal protection of the laws under the Fourteenth Amendment there must be (1) a difference in treatment of different citizens, and (2) a difference motivated by an intent and purpose to discriminate on account of race, i.e., an invidious discrimination.[22] Before the second requirement comes into play there must be a "difference" or inequality, not present here. Motive is therefore irrelevant.

The question of the right of a municipality or a state to completely close some recreational facility has been fre-

22. The prohibition of the equal protection clause goes no further than invidious distinction. *Snowden*, supra. See *Ferguson* v. *Skrupa*, 372 U.S. 726, 10 L.ed.2d 93 (1963); *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 90 L.ed. 1096 (1946).

quently submitted to lower courts. In each and every instance the courts have pointed out that where all citizens are treated equally no question arises under the Fourteenth Amendment and that the determinative issue is that citizens had no constitutional right whatsoever to such facilities.[23] The court below in affirming the District Court held that the closing of all pools to all citizens did not deny Negroes the equal protection of the law and then stated:

> "The operation of swimming pools is not an essential public function in the same sense as the conduct of elections, the governing of a company town, the operation or provision for the operation of a public utility, or the operation and financing of public schools." (A. 48).
>
> ". . . As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation.
>
> "There is, of course, no constitutional right to have access to a public swimming pool." (A. 49).

The holding in this case of the Fifth Circuit is in accord with its previous holding in *City of Montgomery* v. *Gilmore*, C.A. 5, 277 F.2d 364 (1960) where the issue was the right of the City to close its parks. There that Court held:

> "We agree with the district court that no law, State or Federal, requires the City to operate public parks. . . . In its resolution closing the parks, the Board of Commissioners . . . stated that, 'the members of the Commission are of the opinion that it is to the best

23. For this reason the basic thrust of Petitioners' argument is necessarily under the Thirteenth Amendment which, as pointed out under Point I hereof, cannot be justified.

interests of the citizens of Montgomery that said parks be closed.' That is a matter committed to the wisdom of the members of the Board of Commissioners, and is not subject to review by this Court in the absence of some violation of the Constitution of the United States."

Also, see the opinion of the Fifth Circuit in *Hampton* v. *City of Jacksonville,* C.A. 5, 304 F.2d 319 (1962).

In *Tonkins* v. *City of Greensboro,* D.C. N.C., 162 F.Supp. 549 (1958), 175 F.Supp. 476 (1959), aff'd C.A. 4, 276 F.2d 890 (1960), there was involved the issue as to whether or not the City had the right to close pools rather than operate them on an integrated basis. The Courts answer this question in the affirmative on the ground that no person had a constitutional right to swim in a public pool. The Court stated:

"With respect to the right of the plaintiffs, and other Negroes similarly situated, to use the Lindley Park Swimming Pool on the same terms and conditions applicable to white citizens, this would appear to be a moot question. The City of Greensboro, through its City Council, is firmly committed to a permanent closing and sale of the pool. . . . The question here presented is whether the defendants have the right to close or sell the Lindley Park Swimming Pool rather than to operate it on an integrated basis. The plaintiffs contend that the answer to this question depends upon whether there is a duty imposed upon the defendants to support the Fourteenth Amendment to the Constitution of the United States. There is no question but that the defendants do have a positive duty to support the Fourteenth Amendment and other provisions of the Constitution of the United States, as these provisions are interpreted by our Courts, *but the question still remains as to whether or not the Constitution of the United States imposes upon a municipality the positive duty to own and operate recreational facilities.* . . . In the final analysis, the plaintiffs can only com-

plain of discrimination or unequal treatment. If the swimming pools are closed to all, or disposed of through a bona fide public sale, there can be no unequal treatment and, therefore, no racial discrimination. No citizen of Greensboro will have access to municipal swimming facilities. *Unless persons under the same circumstances and conditions are treated differently there can be no discrimination. No person has any constitutional right to swim in a public pool.* All citizens do have the right, however, if a swimming pool is provided, not to be barred therefrom solely because of race or color. If the swimming pools are closed or sold, the rights of all groups will be equal, and it must follow that the closing or sale will not discriminate against anyone. . . .

"*No one contends that this Court has the power to require the State of South Carolina to operate any park.* This Court cannot by mandamus order the reopening of the closed park. In Simkins v. City of Greensboro, D.C. M.D. N.C. 1957, 149 F.Supp. 562, it was held that a municipality was not required to furnish a golf course for its citizens but if it undertakes to do so out of public treasury, it cannot constitutionally furnish such facilities to a part of its citizens and deny them to others similarly situated." (Quotation is from 162 F.Supp. 549)

To the same effect see *Wood* v. *Vaughan*, D.C. Va., 209 F.Supp. 106 (1962), aff'd C.A. 4, 321 F.2d 474 (1963), and *Walker* v. *Shaw*, D.C. S.C., 209 F.Supp. 569 (1962).

In *Legarde* v. *Recreation & Park Commission*, D.C. La., 229 F.Supp. 379 (1964), the Court held:

"There is no legal obligation or duty on the part of the City or Parish to provide or operate any public recreational facilities. . . ."

In *Willie* v. *Harris County, Tex.*, 202 F.Supp. 549 (1962), the Court pointed out that there was no constitu-

tional compulsion which directed a state or its subdivisions to furnish recreational facilities.

With all public swimming pools in the City of Jackson now closed, and closed since 1963, there is no question of any discrimination on account of race and therefore no question arises under the Fourteenth Amendment to the Constitution.

Petitioners can cite no case to the contrary. Instead several arguments are made without factual support or legal basis.

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i.e. Petitioners argue: "A", The sole reason for closing the municipal swimming pools was to prevent integration.

The proof and findings of the court below were to the contrary. True, the administrative decision to close all pools followed, and to that extent resulted from, the judicial requirement that pools and all recreational functions must be integrated. Petitioners fail to note the difference between a decision involving racial considerations and an action based on an intent and desire to discriminate.

As stated by the court below:

> "True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. (A. 47) . . . The pools were closed because they could not be operated safely or economically on an integrated basis. Is that a denial of equal protection of the laws? . . . In our opinion that simply is not true." (A. 48)

No statement could be more erroneous than Petitioners' statement that actions that are the result of "racial

motivation are *per se* discriminatory". The cases cited[24] do not support any such statement. What these decisions hold with reference to motivation is that *where there is actual discrimination* that other motives would not prevent them from being unconstitutional, i.e., *discrimination cannot be justified on the ground of other motives.*

Motives do not create discrimination when there is no actual discrimination and no actual denial of any constitutional rights. Motives do not create a new constitutional right.

The motives of Congress or of a State Legislature or of a City Council are not subject to judicial scrutiny so long as the enactment is within the authority of the legislative branch and denies no constitutional rights.

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in Arizona v. California, 283 U.S. 423, 455, 75 L.Ed. 1154, 1165 . . ." *United States* v. *O'Brien*, 391 U.S. 367, 20 L.ed.2d 672 (1968).

Cases to the same effect include: *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 93 L.ed. 632 (1949); *Tenney* v. *Brandhove*, 341 U.S. 367, 95 L.ed. 1019 (1951); *Barenblatt* v. *U. S.*, 360 U.S. 109, 3 L.ed.2d 1115 (1958); *Doyle* v. *Continental Ins. Co.*, 94 U.S. 535, 24 L.ed. 148 (1877); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310

24. *Brown* v. *Board of Education*, supra; *Griffin* v. *County Board*, 377 U.S. 218, 12 L.ed.2d 218 (1964); *Adickes* v. *S. H. Kress & Co.*, ____ U.S. ____, 24 L.ed.2d 142 (1970). In each of these cases actual discrimination or unequal treatment existed. There is not here involved any classification based upon race as in *McLaughlin* v. *Florida*, 379 U.S. 184, 13 L.ed.2d 222 (1964), the other case relied on by Petitioners.

U.S. 381, 84 L.ed. 1263 (1940); *Sonzinsky* v. *U. S.*, 300 U.S. 506, 81 L.ed. 772 (1937); *Sipes* v. *United States*, D.C. 8, 321 F.2d 174 (1963), cert. den. 375 U.S. 913, 11 L.ed.2d 150 (1963); *United States* v. *Miller*, 307 U.S. 174, 83 L.ed. 1206 (1939).

The closing of the swimming pools not being in fact discriminatory or denying Petitioners the equal protection of the law, discussion of the motive of the city council in making its decision is thus irrelevant and immaterial. Motive behind municipal legislative action can only be examined where the action embodies a denial of constitutionally protected rights.

Or: Petitioners next argue: "B", The closing of all swimming pools was an act which was per se in violation of the equal protection of the Fourteenth Amendment.

No case cited by Petitioners so holds.

Petitioners rely on *Griffin* v. *The County School Board of Prince Edward County, Virginia*, 377 U.S. 218, 12 L.ed. 2d 256 (1964), involving the closing of the public schools in Prince Edward County, Virginia.

The relationship of a government to the operation of the public schools is not comparable to the furnishing of a recreational facility such as a swimming pool. The furnishing of such recreational facilities is the exercise of the discretionary proprietary power of a local government, although, of course, if operated they must be integrated. However, the operation of public schools is the exercise of a governmental power, usually required by state laws or constitutional provisions.

However in *Griffin* the Court merely held that the closing of the county school actually resulted in discrimi-

nation against the petitioners and a denial of the equal protection of the law under the Fourteenth Amendment for two reasons:

(1) The state was discriminating against Petitioners in that it was by public statewide taxation supporting the public schools in every other county of the state except in Prince Edward County.

(2) Both the county and state were discriminating against petitioners, in that they both contributed to the support of private schools in Prince Edward County, but not to any public schools therein.

That this was the basis for and the only basis for the holding of a denial of Fourteenth Amendment constitutional rights clearly appears from the following language in the opinion:

> "For reasons to be stated, we agree with the District Court, that, under the circumstances here, closing the Prince Edward County Schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment. . . . The new complaint charged that Prince Edward County was still using its funds, along with state funds, to assist private schools while at the same time closing down the county's public schools. . . . While the Louisiana plan and the Virginia plan worked in different ways, it is plain that both were created to accomplish [i.e., did accomplish] the same thing: the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds. See Cooper v. Aaron, 358 U.S. 1, 17, 3 L ed 2d 5, 16, 78 S Ct 1401 (1958). Either plan works to deny colored students equal protection of the laws. Accord-

ingly, we agree with the District Court that closing the Prince Edward schools *and meanwhile contributing to the support of the private segregated white schools that took their place* denied petitioners the equal protection of the laws."

The Court in *Griffin* thus held that the children of all races had a right to public schools, *if* any children were being furnished such privileges by the county. This is a far cry from a holding that any citizens of Jackson have a constitutional right to recreational facilities, such as a public swimming pool, when none of the citizens thereof are being furnished such facilities and no such private facilities are supported by the City.

For some reason Petitioners rely strongly on *Evans* v. *Newton*, 382 U.S. 296, 15 L.ed.2d 373 (1966), and the successor case of *Evans* v. *Abney*, ... U.S. ....., 24 L. ed.2d 634 (1970). The cases involved a park in Macon, Georgia which had been left by will of Senator Bacon to the Mayor and Council of the City of Macon to be used as a park for white people only. The City kept the park segregated for some years but later let Negroes use it on the ground that it could not maintain the park on a segregated basis. Suit was brought to have the Georgia Court appoint new private trustees to whom the title would be transferred. Thereafter the City resigned as Trustee. The Georgia Court accepted the resignation of the City as Trustee and appointed three individuals as new Trustees. On appeal the Supreme Court of Georgia affirmed. This Court reversed and held that under the particular circumstances the park must still be treated as a public institution subject to the Fourteenth Amendment, regardless of who had title under state law, and that it must be maintained on an integrated basis. The limited holding

of this Court in the first case is shown in the opinion as follows:

> ". . . The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of 'private' trustees. *So far as this record shows, there has been no change in municipal maintenance and concern over this facility.* Whether these public characteristics will in time be dissipated is wholly conjectural. *If the municipality remains entwined in the management or control of the park,* it remains subject to the restraints of the Fourteenth Amendment. . . . We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." (15 L.ed.2d at p. 378)[25]

After the above decision the trustees filed another suit in the Georgia Court alleging that the trust had become unenforceable and the trust property had reverted to Senator Bacon's heirs. The Supreme Court of Georgia so held. This Court in the second case affirmed the Supreme Court of Georgia holding that the decision of the Supreme Court of Georgia did not violate the Fourteenth Amendment but that the court had merely exercised its judicial judgment in construing the will and that the holding of the reversion to the testator's heirs did not result in any discrimination, stating:

> "Here the effect of the Georgia decision *eliminated all discrimination against Negroes* in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park facilities had it continued." (24 L.ed.2d).

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25. The case did not hold, as alleged by Petitioners in their brief, that State officials may not close public facilities to avoid integration.

This is the exact position of respondents here, i.e., that the decision of the City Council eliminated all discrimination against Negroes.

Petitioners then argue: "C", The City could not justify closing its swimming pools on the ground that they could not be operated economically or safely on an integrated basis.

We can admit that no municipality can justify operating such facility *on a segregated basis* on the ground that the operation thereof is neither economical nor safe. This was the only holding of any of the cases relied on by Petitioners.[26]

On the other hand, the promotion of public peace and the preservation of the economic condition of the City would justify an exercise of the police power of the City where it did not result in unequal treatment or deny any citizens any of their constitutional rights. *Mosher* v. *Beirne*, C.A. 8, 357 F.2d 638 (1966); *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 90 L.ed. 1096 (1946); *East New York Savings Bank* v. *Hahn*, 326 U.S. 230, 90 L.ed. 34 (1945); *Hughes* v. *Superior Court of California*, 339 U.S. 460, 94 L.ed. 985 (1950); *Day-Brite Lighting* v. *State of Missouri*, 342 U.S. 421, 96 L.ed. 469 (1952); *Buck* v. *Bell*, 274 U.S. 200, 71 L.ed. 1000 (1927); *El Paso* v. *Simmons*, 379 U.S. 497, 13 L.ed.2d 446 (1965).

This Court has not suggested that the police power of the State could not be exercised in its discretion where,

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26. For example: In *Buchanan* v. *Warley*, 245 U.S. 60, 62 L.ed. 149 (1917) it was merely held that the position that segregation would promote the public peace by preventing race conflicts did not justify the denial of constitutional rights. To the same limited effect was *Cooper* v. *Aaron*, 358 U.S. 27, 3 L.ed.2d 1 (1958). Similarly, in *Watson* v. *City of Memphis*, 373 U.S. 526, 10 L.ed.2d 529 (1963), the Court would not justify continuance of segregation in the parks on the ground of safety and economy.

to paraphrase the language of *Evans* v. *Abney*, supra, the effect of the exercise thereof will not cause but would eliminate all discrimination against Negroes by eliminating the swimming pools themselves and the termination of the operation thereof would be a loss shared equally by the white and Negro citizens of Jackson.

The result of the closing of all pools because they could not be operated safely and economically on an integrated basis did not deprive Negroes of the equal protection of the law. There is no constitutional right of any citizen to have access to a public swimming pool where no other citizen has such access. The City did not, therefore, need what Petitioners call its "excuses" in order to cease to operate this discretionary proprietary function of the City.

Petitioners then argue: "D", The closing of the pools to all citizens is unequal because the closing had a worse effect on the black citizens than it did on the white.

There is no proof whatsoever to support any such allegation. Let us assume that the closing has a worse effect on middle class citizens or on the poor, but on citizens of both races who are middle class or poor, than it did on a few wealthy citizens in the City of Jackson. As pointed out in Judge Rives' opinion in the court below:

> ". . . The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens [of both races] of recreational facilities available on a complete private basis to the more affluent."

If there is any inequality it is purely financial, not racial. As many white citizens as black are denied any such facility.

"The guaranty of the Fourteenth Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state." *Stebbins* v. *Riley*, 268 U.S. 137, 69 L.ed. 884 (1925).

Not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it upon another. Exact equality is no prerequisite of equal protection. *Norvell* v. *State of Illinois*, 373 U.S. 420, 10 L.ed.2d 456 (1963).

Very pertinent is the decision in *Coopage* v. *Kansas*, 236 U.S. 1, 59 L.ed. 441 (1915), wherein it is held that the legislature of a state cannot constitutionally remove normal inequalities, stating:

> ". . . No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; . . . And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."

The thrust of *Griffin*, supra, was *not* that the closing of the schools bore more heavily on Negro children than on white children as a mere result of the closing but that it bore more heavily on the Negro children because there was an actual discrimination against them in that the county and state were contributing to the support of private

schools for white only. It was this discriminatory treatment, in the vital field of education,[27] upon which the denial of equal protection of the law was based.

The furnishing of a swimming pool is not such a basic function of a city or such a basic public responsibility. While admittedly where a city has undertaken to provide swimming pools they must be available to all citizens on equal terms, still by a decision to no longer provide such facilities as swimming pools no one is deprived of any constitutional right.

Petitioners are in error in stating that this Court has declared unconstitutional statutes equally applicable to all races. They have misunderstood *Loving* v. *Virginia*, 388 U.S. 1, 18 L.ed.2d 1010 (1967), involving a statute of Virginia forbidding the intermarriage of whites and Negroes. The Court did not hold that this statute was applicable on its face to both black and white citizens alike. This was the contention of the state and the Court held otherwise. The Court held that the statute was based on an unconstitutional classification by race by a denial of some, but not all citizens to marry. This is clear from the language in the opinion.[28]

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27. "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms." *Brown* v. *Board of Education*, supra, at p. 830.

28. "There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restrict-

In *Anderson* v. *Martin*, 375 U.S. 399, 11 L.ed.2d 430 (1963), the necessary effect of the statute was held to be invidious discrimination.

Thus, the legislative decision of the City Council here is not only applicable on its face to both black and white citizens but as actually applied is equally applicable to both black and white citizens.

Finally Petitioners argue: "E", The City has fostered private discrimination in swimming pools.

Petitioners have failed to prove any such allegation. There were private segregated pools in the City of Jackson before the City closed its pools. There are still privately owned segregated pools. There is no proof that during the two years after the closing of the pools and before this suit was brought that any additional private swimming facilities were developed. There is no proof of the allegation by Petitioners that the City has "insured that private swimming pools *will be developed* to take their place (i.e., the place of the closed pools)".

Apparently Petitioners rely only on the fact that the City relinquished its lease on the Leavell Woods Pool to its owners, the Leavell Woods Community Foundation, a private corporation. The City did not own the pool but merely had it under lease and terminated its lease. What the Foundation is doing with the pool, its own property, is beyond any control of the City and is unknown to the City. The City has no contract with the Foundation. There is no maintenance of or management of and control over the pool by the City as in *Evans* v. *Newton*, supra.

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ing the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."

The District Court below in its letter opinion of September 14, 1965 stated: "The evidence does not support the plaintiffs' contention as to the Leavell Woods Pool which does not belong to the City but was leased by the City and that lease was terminated by the City as lessee several years ago" (A. 24). There was no proof whatsoever of any contractual relationship between the City and the Foundation. The City Council has no right to control and has not purported to nor made any effort to control or influence the use of private pools with which the City has no connection.

The City here has not leased its pools to private individuals and therefore has not placed "its power or property or prestige behind . . . (any) discrimination" as in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.ed.2d 45 (1961). There is no state participation in any segregated pools "through any arrangement, management, funds or property". Cf. *Cooper* v. *Aaron*, supra.

In *Tate* v. *Department of Conservation*, 133 F.Supp. 53 (1955), aff'd 231 F.2d 615 (1956), cert. den. 352 U.S. 838, 1 L.ed.2d 56 (1956), the Court held that if the state leased its public parks it would have to see that they were operated without discrimination. However, the Court carefully added: "If, in the wisdom of the leaders of this Commonwealth, it is determined to close Seashore State Park, this is not a matter for determination by the Court."

The City is not here aiding or assisting or subsidizing or supporting in any way any private pools as in *Poindexter* v. *Louisiana Financial Assistance Commission*, D. C. La., opinion unprinted, cited by Petitioners, where the State authorized the payment of state tuition grants for children in private schools.

The City here has enacted no ordinance or regulation requiring segregation of swimming pools, making inapplicable *Peterson* v. *City of Greenville*, 373 U.S. 244, 10 L.ed.2d 323 (1963), and *Robinson* v. *Florida*, 378 U.S. 153, 12 L.ed.2d 771 (1964), relied on by Petitioners. No official of the City here has announced that the City would not permit integrated *private* swimming pools, making inapplicable *Lombard* v. *Louisiana*, 373 U.S. 267, 10 L.ed.2d 338 (1963), relied on by Petitioners.

The fallacy of Petitioners' argument is apparent:

Totally inapplicable, and only confusing the issue, are cases relied on by Petitioners where actions are brought *against private citizens for discrimination* and the issue was whether this discrimination was state action because authorized by or an instrument of the state, i.e., *Reitman* v. *Mulkey*, 387 U.S. 369, 18 L.ed.2d 830 (1967), and *Adickes* v. *S. H. Kress & Co.*, ... U.S. ....., 24 L.ed.2d 142 (1970).[29] This issue is simply not involved here.

i.e., *Reitman*, supra, an action against private owners of property for actual discrimination in rental thereof, merely held within Fourteenth Amendment because of involvement of State through a California Constitutional provision.

i.e., *Adickes*, supra, cited by Petitioners *nine* times in their brief, an action brought to recover damages *from a private corporation* (Kress & Co.) *for admitted discrimination in refusing to serve plaintiff in its restaurant facilities*. The question involved was merely whether or not this discrimination was within the Fourteenth Amendment as "State Action".

This is not an action to prevent discrimination by third parties. There is no question here but that the act of the

29. As well as *Burton*, *Peterson*, *Robinson* and *Lombard*, supra, relied on by Petitioners previously referred to.

City in closing its own pools was a State action. By merely closing its own pools and ceasing to operate them and deciding not to furnish this recreational facility to any citizen the City did not itself deny equal protection of the law to Petitioners.

If Petitioners are correct in their allegations that since this decision of the City private citizens are discriminating in private pools on account of race and that their acts are in violation of the Fourteenth Amendment because there can be said to be City involvement, which is denied, then the cause of action of Petitioners is against the private persons who are discriminating. Thus, if Leavell Woods Community Foundation, a private Mississippi corporation, is discriminating against Petitioners by denying them the right to swim in its pool, then Petitioners' cause of action is against that corporation and they can there argue if they desire that it is State action and therefore within the Fourteenth Amendment. The Foundation cannot be controlled by this action. The City cannot control it.

Petitioners cite no case where the Courts have taken affirmative action against a State or a City because of private discrimination, even though there was indirect State involvement in the private discrimination. Where the governmental agency itself is not discriminating or denying equal protection of the law, then the relief for any discrimination by any third party must be against that third party.

We do not need to nor purport to answer the question of whether or not any private persons, corporations or individuals operating segregated swimming pools in the City could be subjected to suit on the ground that it constituted State action. All that Respondents submit is that the City of Jackson cannot be forced by mandamus to provide swimming pool facilities to its citizens, if none is provided

to any citizen, merely because there may be discrimination by private individuals or corporations in the operation of private pools and certainly not where the City did not cause, assist or participate in such discrimination.

POINT III

Petitioners Are Not Entitled to Injunctive Relief on the Ground That Respondents Closed the City Pools with the Intent to Punish and for the Purpose of Punishing Negroes in the Community for Resorting to Litigation in Clark.

Petitioners ask the Court to assume that by the closing of the swimming pools Jackson Negroes were being punished by the City because they brought the prior *Clark* suit in the Federal Court. They have entirely overlooked the fact that there is no proof that the act of the City complained of was done with the intent to punish or for the purpose of punishing the Petitioners because of the prior *Clark* litigation.

This position of Petitioners is an afterthought. It was not pled as a ground for relief in the court below and no proof was offered to substantiate any such claim.[30]

It is quite true that Petitioners and any citizens have a right to bring a suit in a Federal Court to redress constitutional grievances and cannot be deprived of this right by threats, intimidations, arrests, etc. It is true that a City does not have a right to intentionally and purposefully deprive Negro citizens of *constitutional rights* for redressing grievances in the Federal Court. However, here (1) Petitioners have not been deprived of any right to litigate,

30. This position of Petitioners here is grasped from a few general remarks made by Judge Wisdom in his dissenting opinion in the court below (A. 71-72). He merely said that the successful prior litigation had taught Negroes a lesson and that Negroes would now think twice before contesting segregated facilities. He did not purport to say that the closing of the pools was the result of an intent and purpose on the part of the City to punish Jackson Negroes.

and (2) Petitioners have not been deprived of any constitutional rights because of prior litigation. One or the other is a prerequisite to relief for punishment and neither are present here.

Moreover the intent and motive of the City in closing the city pools is a question of fact and there is no proof whatsoever here that the City closed the pools for the purpose of punishing Negro citizens for the prior litigation.

The earlier litigation referred to, *Clark*, supra, was brought as a class suit by Negro citizens against the City and sought the integration of public parks, libraries, zoos, golf courses, playgrounds, auditoriums and all other recreational facilities of the City. All were integrated thereby. The City did not punish the Negro citizens by closing any of these other recreational facilities. There has been other litigation against the City of Jackson by Negro citizens and as a result thereof public buildings, schools, transportation facilities, etc., have been integrated. There has been no closing of any of these facilities or any portions thereof after the litigation. Only the swimming pools, and all swimming pools, were closed and the undisputed proof is that they were closed because the operation of swimming pools on an integrated basis would in the best judgment and discretion of the City Commissioners lead to a large economic loss to the City and prevent the enforcement of law and order.[31]

There is no suggestion that the City in any way tried to prevent the filing of the *Clark* suit, i.e., by threats, intimations, etc. There is not one iota of proof that the City of Jackson has ever by threats, intimidations or in any other manner threatened the closing of any public facilities

31. It is, of course, unfortunate that a few thousand Negroes have thus been deprived of the pleasure of swimming in the City pools. It is unfortunate that at least an equal number, if not more, white citizens have been denied this same pleasure.

should any other litigation be brought. The City did not appeal from the decision of the District Court.

Petitioners suggest as if supporting their position that *Congress* by the National Labor Relations Act, 29 U.S.C. 158(a)(4)[32] has made it an unfair labor practice for a union to restrain or coerce an employer because he had brought a complaint to the National Labor Relations Board.

However, Petitioners here do not come within the rules applicable to such unfair labor practices. For example: In *N.L.R.B.* v. *Almeida Bus Lines*, C.A. 1, 333 F.2d 725 (1964), an employee claimed that he was fired because of his union activities. The employer alleged that he was fired because he had had too many accidents. The Court in reversing the finding of the Board that there had been an unfair labor practice stated:

> ". . . But it is not for the Board to determine whether or not an employer's business judgment was too harsh under the circumstances. Rather, the burden is on the Board to show that an improper motive dictated the employer's decision to fire its employee and absent such a showing, the employer's right to make such a decision must be respected. N.L.R.B. v. United Parcel Service, Inc., 317 F.2d 912 (1st Cir. 1963); National Labor Rel. Bd. v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954)."

Or as stated in *Keilwood Company* v. *N.L.R.B.*, C.A. 8, 411 F.2d 493 (1969):

> ". . . The burden of proving an improper motivation in making the discharge is upon the General Counsel. An employer's general hostility to the Union does not standing alone supply an unlawful motivation for a specific discharge for good cause."

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32. Justified under the Commerce Clause of the Constitution.

See *N.L.R.B.* v. *Dominick's Finer Foods*, C.A. 7, 367 F.2d 781 (1966). Also *N.L.R.B.* v. *Gotham Industries*, C.A. 1, 406 F.2d 1306 (1969).

Moreover, the burden on the employee is to prove his case by "*substantial evidence* pointing toward unlawful motive." *N.L.R.B.* v. *Winn-Dixie Stores*, C.A. 5, 410 F.2d 1119 (1969); *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332, 83 L.ed. 682 (1939).

Petitioners do not mention the requirements of the National Labor Relations Act that a business should not be closed because of union activities by employees. See *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 13 L.ed.2d 827 (1965), holding, where there were no threats of closing to discourage unionization: ". . . When an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."[33]

Curtailment or partial suspension of operations motivated by economic reasons does not constitute unfair labor practice. *N.L.R.B.* v. *Dale Industries*, C.A. 6, 355 F.2d 851 (1966); *N.L.R.B.* v. *Lassing*, C.A. 6, 284 F.2d 781 (1960). Cf. *N.L.R.B.* v. *Brown*, 380 U.S. 278, 13 L.ed.2d 839 (1965).

Moreover, in the N.L.R.B. cases the right of the Government to forbid the closing of a business or the discharge of employees in retaliation for union activities was pursuant to a Federal Statute enacted under the Commerce Clause and applicable only to businesses involving interstate commerce. Congress has enacted no such statute forbidding the closing by municipalities of a purely local recreational facility nor would such a statute be justified un-

33. See particularly Note 20, 13 L.ed.2d at p. 836.

der any provision of the Constitution. Petitioners here do not come within the provisions of 42 U.S.C. 1981.[34]

Equally inapplicable are cases relied on by Petitioners under § 203(c) of the *Civil Rights Act of 1964*, regulating the segregated use of public lunch rooms "dealing extensively in interstate commerce" (i.e. under the Commerce Clause) and prohibiting punishments by criminal prosecution of any person for exercising his right or privilege with reference thereto, i.e., *Hamm* v. *Rock Hill*, 379 U.S. 306, 13 L.ed.2d 300 (1964), or, indirectly, *State of Georgia* v. *Rachael*, 384 U.S. 780, 16 L.ed.2d 925 (1966). Here respondents have not punished or attempted to punish Negro citizens by criminal prosecution.

We are unable to understand Petitioners' reliance on *NAACP* v. *Buntin*, 371 U.S. 415, 9 L.ed.2d 405, which held unconstitutional Chapter 33 of the Laws of Virginia forbidding solicitation of legal business by an agent of organizations in connection with actions to which the organization was not a party, i.e., a deliberate attempt to suppress litigation. The Court merely held that this State statute as applied to the NAACP denied *First Amendment* rights of the Negro minorities. There is not involved here any statute of the State of Mississippi or Ordinance of the City of Jackson or any acts of such governmental entities which tended to or attempted to or had the result of depriving Negro citizens of any First Amendment rights or right to bring the *Clark* litigation or any other litigation.[35]

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34. There is simply not involved any right to make and enforce contracts, to sue, be parties, give evidence or the right to full and equal benefit of all laws and proceedings for the security of persons and property enjoyed by white citizens.

35. This citation is a typical example of Petitioners' attempt to pick up a clause out of context from a decision and base a new principle of law thereon without consideration of the holding of the case from which the clause is extracted, i.e., "litigation may well be the sole practical avenue open to a minority to petition for redress of grievances".

Equally inapplicable is Petitioners' citation of *Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L.ed.2d 22 (1965), where the court merely held that a State could not "chill" the exercise of constitutional rights by means of threats of criminal prosecution, with no hope of success, made only to discourage civil rights litigation. There were and are no such threats made by the City here either before or since the *Clark* case.

Petitioners cite *Sullivan* v. *Little Hunting Park*, ... U.S. ....., 24 L.ed.2d 386 (1969), which involved a deprivation of a "fundamental right" of the ownership of property. In that case there was no question of fact. It was admitted that plaintiff was deprived of his constitutional *property rights* in a club solely because of an assignment of the same to a Negro. The Court merely held he could not be expelled from the club for that reason.

Petitioners cite *Edwards* v. *Habid*, C.A. D.C., 397 F.2d 687 (1968), cert. den. 393 U.S. 1016, 21 L.ed.2d 560 (1969), where there was an alleged deprivation of constitutional *rights of property* of a tenant purportedly in retaliation for the tenant's complaints to the Housing Authorities. The Court reversed to allow the tenant ". . . to *try to prove* to a jury that her landlord who seeks to evict her harbors a retaliatory intent". The court then pointed out that the question of permissible or impermissible purpose is one of fact for the court or jury and that such a determination "is not easy to prove".

Similarly Petitioners cite *United States* v. *Board of Education of Greene County, Mississippi*, C.A. 5, 332 F.2d 40 (1964), where there was involved the "fundamental right" to vote. The action was brought by a Negro teacher under 42 *U.S.C.* 1971(b) forbidding the intimidation or threatening of any person for the purpose of interfering with their right to vote. The plaintiff alleged that she had

been refused re-employment because she had filed an affidavit with the Justice Department complaining of the Registrar's refusal to register her to vote. The Court in refusing to require the school board to re-employ her, stated:

> ". . . The determination of design, motive, purpose, or intent is also dependent upon the testimony produced at the trial . . . Findings as to intent, motive, purpose, or design are not to be tried de novo, but such findings are to be reviewed by the same standards applied in reviewing other facts."

However the fallacy of Petitioners' argument is that they were neither deprived of their right to litigate nor deprived of any constitutional right. Where there is no inequality, the right to have a city furnish any certain public recreational facility is not a constitutional right. No act of Congress has required or could require it under the Constitution. The City merely did what it had a right to do.

CONCLUSION

Respondents respectfully submit that this cause should be affirmed.

Respectfully submitted,

JOHN E. STONE
City Attorney
City Hall
Jackson, Mississippi
THOMAS H. WATKINS
Suite 800—Bankers Trust Plaza Bldg.
Jackson, Mississippi
ELIZABETH W. GRAYSON
Suite 800—Bankers Trust Plaza Bldg.
Jackson, Mississippi
Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Brief for Respondents has this 17th day of August, 1970, been mailed by United States Mail, postage prepaid, to:

1. Ernest Goodman, Paul A. Rosen, William H. Goodman
   3200 Cadillac Tower
   Detroit, Michigan 48226
2. William M. Kunstler
   Center for Constitutional Rights
   588 Ninth Avenue
   New York, New York 10036
3. W. William Hodes
   Center for Constitutional Rights
   305 Baronne Street
   New Orleans, La. 70112
4. Armand Derfner
   603 North Farish Street
   Jackson, Mississippi
5. Alix Sanders
   109-1/2 Johnson Street
   Greenwood, Mississippi
6. John Thames
   206 East Jordan Avenue
   West Point, Mississippi